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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1457

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO LOCAL 1969, et al.,
Petitioners,

VS.

REBECCA BISE, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF IN OPPOSITION

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JURISDICTION

Petitioners' references to the opinions below and to the jurisdiction of this Court on a Petition for Certiorari are correctly set forth.

QUESTIONS PRESENTED

The "questions presented" as stated by Petitioners are incorrect. The questions presented by this case are:

1. Are punitive damages appropriate for violations of rights protected under the Labor Management Reporting

and Disclosure Act (LMRDA) where the conduct of the union is egregious.

2. May a Court review a union's improper intent and motive for disciplining its members.

3. Is the Requirement of Exhaustion of union remedies within the discretion of the District Court.

4. Is there sufficient evidence to support the jury's award of damages.

STATEMENT OF THE CASE

The Petitioners have incompletely stated the case in their Petition for Writ of Certiorari. Therefore, Respondents submit their statement of the case.

Respondents brought this action on January 8, 1975, following the improper imposition of discipline by Petitioners for the exercise of rights protected under the LMRDA.

A. Conduct of Respondents

Respondent Wil Klatt, as a foreman at Precision Plastics, was concerned about whether or not a foreman could work during the upcoming strike (RT. 247,248).[1] Klatt, along with Respondent Bise, who lives with Klatt (RT. 291), went to the National Labor Relations Board (NLRB) and was there informed of being able to resign and return to work without being punished by the union (RT. 248). Respondents Klatt, Bise, Lee Ornellas and Fran Kaona would often gather at Kaona's home during the strike, to

[1]RT. references herein refer to the Reporter's Transcript of the proceedings at trial and are part of the record on file with the Court of Appeal.

pool money for food, socialize, dance, play cards (RT. 296-297) and they would discuss the strike (RT. 249). Klatt informed others of the information obtained from the NLRB (RT. 249).

During one such gathering Rachel Buser, a union member, came to Kaona's home with Richard Pino. They were not invited, but went on a friendly basis. It was Buser and Pino who brought up the topic of arbitration, the strike and Klatt's consideration of resigning and returning to work (RT. 726, 727). Kaona (RT. 333), Bise (RT. 297) and Klatt (RT. 252) were present that night, but Ornellas was not (RT. 361). At no time did either Klatt, Bise or Kaona try to persuade Buser to cross the picket line (RT. 726).

Following a July 31, 1974 union meeting at the Royal Inn Hotel, Bise, Kaona, Klatt, Ornellas, Maxine "Chris" Stones and some other people gathered around the Stones' truck (R.T. 251,299). Respondent Claude Stones did not attend that meeting; he sat in their pickup truck in the parking lot (R.T. 131). There were some expressions of dissatisfaction with the union, with the continuation of the strike, and a desire to return to work (R.T. 298,252,336,337). Maxine Stones had not had any contact or discussions with, either by phone or in person (R.T. 131) nor had she seen, any of the other respondents except at union meetings (RT. 133) before the gathering around her truck. Respondents Stella Bradley (RT. 418) and Vicky Pappas (RT. 683) had not gathered around the truck, nor had Dan Carr.

When these people dispersed, Maxine and Claude Stones went home (RT. 134) and Bise, along with Kaona, Klatt

and Ornellas went to Precision Plastics to pick up her vacation check. Kaona, Klatt and Ornellas were in Bise's auto because they had all driven to the union meeting together (RT. 300,301). Bise had permission from Petitioner Elsie Smith to pick up her vacation check (RT. 301,302,335).[2] There were no pickets walking up and down with picket signs when these four Respondents entered Precision Plastics (RT. 771,313). Klatt went in the plant to tell his supervisor that he was going to resign and return to work (RT. 258). Bise indicated to the secretary, Olga, that she was dissatisfied with the strike and that she would probably be to work Monday (RT. 302,303). Kaona told Roger Houle, the plant manager, that she was dissatisfied with the strike continuing and that she would like to return to work (RT. 337,338). Ornellas didn't say anything about resigning and returning to work, she just exchanged "hellos" (RT. 364,365). Ornellas and Bise did not decide to resign until the next day, August 1, 1974 (RT. 365,296). After leaving the plant, these Respondents went home (RT. 339).

On August 1, 1974, Bise, Kaona, Klatt and Ornellas each typed their own letters of resignation on Kaona's typewriter (RT. 340,258,304,365).

On August 1, 1974, Klatt called Respondent Stella Bradley because she had indicated, through her actions during the July 31, 1974 union meeting, that she was dissatisfied with the strike. Klatt asked Bradley if she wanted to return to work and she indicated that she did. Klatt told

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[2]Petitioners' assertion to the contrary in footnote 4 of the Petition is not accurate.

her about the information received concerning the permissibility of returning to work and a copy of a resignation letter was offered (RT. 264,265). This was the only conversation Bradley had with any of the Respondents until she returned to work (RT. 413,414).

On August 2, 1974, Maxine Stones called and told Klatt that she was going to go back to work. Klatt was noncommittal and evasive (RT. 135,165). Stones indicated she was going to resign but didn't know how to word a letter of resignation at which point Klatt offered to give her a copy of the letter (RT. 260). Stones asked to have a copy typed and one was typed by Bise (RT. 260,261) who had also typed a copy for Bradley (RT. 304).

On August 2, 1974, the resignation letters of Bise, Klatt, Ornellas, Kaona and Maxine Stones were mailed by Bise and Kaona (RT. 307). Each returned to work on August 5, 1974 (RT. 307,341,261,367,138). Stella Bradley mailed her letter of resignation on August 3 and returned to work on August 5 (RT. 416).

Rebecca Bise never tried to talk anyone else into resigning and returning to work (RT. 229,313).

Fran Kaona never tried to persuade or talk any other people into resigning from the union and she made up her mind on her own (RT. 346).

Will Klatt did not attempt to convince or talk anyone into resigning and returning to work (RT. 265).

Lee Ornellas did not try to persuade or talk anyone else into resigning and returning to work (RT. 363,370).

Maxine Stones had no contact or discussions, either by phone or in person, with any other Respondent before the July 31st union meeting, nor had she even seen any of them except perhaps at a union meeting (RT. 131,133).

Respondent Dan Carr never met with or had any discussions with any of the other Respondents (RT. 391,392). On one occasion he spoke to Bise by phone and asked about resigning and returning to work without being punished by the union. Bise did not answer him, instead she referred him to the NLRB (RT. 393). That was the only contact he had with any other Respondent during the strike (RT. 392). During the strike, Dan Carr had gone to the home of Tony McCarthy with three other people to talk to him about why he was working during the strike (RT. 338). Because of that, Mr. Appleblom, President of Precision Plastics pressed charges against Carr and brought them to Carr's home (RT. 338,389). While he was there, Carr asked Mr. Appleblom if there was a job for Myra Timberlake, Carr's girlfrined (RT. 390). Carr resigned on August 6, 1974, stating in his letter "TO WHOM IT MAY CONCERN, I quit the Local 1969 IBEW Union as of 8-6-74" (RT. 395). He then called Precision Plastics to inform them of his resignation and return to work, and he asked if there was a job for his friend, Ernie Mokel (RT. 395,396). Carr returned to work August 7, 1974 (RT. 396).

Respondent Clause Stones was not permitted to attend the union meeting before the strike began (RT. 190). He was told to leave by Petitioner Elsie Smith (RT 190). Smith, during a union meeting, referring to Claude and Maxine "Chris" Stones, threatened that "We'll get them

this time" (RT. 676,677). Claude Stones took a withdrawal card from the union and continued to work (RT. 193). Stones did not meet secretly with the company president.[3]

Vicky Pappas never met with, had any contact with, or saw any of the other Respondents during the strike (RT. 680). On August 9, 1974, Pappas called Precision Plastics to find out how she could return to work (RT. 681); she was told to wait a moment, then Klatt came to the phone. She did not know Will was working there. She asked Klatt, "I would like to come back to work. What do I do?" and Klatt said, "Write a letter of resignation." Nothing else was said and she hung up (RT. 706,707). Pappas prepared her own letter of resignation[4] on August 10 and returned to work on August 12 (RT. 707). Respondent Victoria Pappas did not negotiate her return to work with the company president.[4]

B. Conduct of Petitioners

Promptly upon the resignation of each Respondent, Petitioner Elsie Smith, a business representative for Petitioner IBEW, filed charges against them alleging violations of the union constitution for resigning and returning to work (RT. 642,643). Smith filed these charges to "show the other members that the union cared" (RT. 643). Smith testified that when charging these Respondents, she differentiated between them because of their varying conduct

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[3]Petitioners' assertion to the contrary in footnote 2 of the Petition is not accurate.

[4]Petitioners' assertion to the contrary on page 6 of the Petition is not accurate.

(RT. 635). However, each Respondent who resigned was charged identically with having violated the same sections of the same article of the union constitution (RT. 636,637).

Not until the strike was over did Smith drop her charges on advice of counsel (RT. 778).

Upon the conclusion of the strike, Respondents were directed to immediately rejoin the union which they did.

Almost immediately thereafter on September 5, 1974, Petitioner Richard Cripe, Assistant Business Manager of Petitioner IBEW, filed his charges against Respondents. Cripe did not, nor would he, investigate before filing any charges even if they were based on rumor and inference (RT. 462). He would not investigate any kind of charge regardless of what he heard or did not hear (RT. 461). Cripe would not, under any circumstance, ever check into the basis for any charge that he would file (RT. 462). Cripe did not investigate these charges before he filed them (RT. 459,460). Cripe had the time to contact each Respondent and could have contacted them, but did not (RT. 463,464). Cripe based charges on rumors (RT. 473,498,545,600). Cripe charged Respondents for attending a meeting about which he knew nothing; he did not know where or when it was held (RT. 538); he did not know who was there (RT. 541); he did not have any idea at all what was discussed (RT. 544); nor did he know what was accomplished (RT. 543).

Cripe testified that the following are not violations of the Petitioner union's constitution: expressing dissatisfaction (RT. 491), resignation (RT. 487), asking for a copy of the resignation letter (RT. 491,492), talking about withdrawal or talking someone into it (RT. 565,566), using the

same typewriter and paper (RT. 578), typing someone else's resignation letter (RT. 579); talking about resigning and returning to work (RT. 487,486), telling someone of the legality of resigning and returning to work (RT. 553), asking someone if they are going to resign (RT. 554), asking someone to resign and return to work with you (RT. 554), mailing someone else's resignation letter (RT. 580).

Cripe knew that the union would impose fines against Respondents in order to make an example out of these people, to show them that if they did this again they would be subject to the same charges and fines and to impress on them that they could not do what they did and get away with it (RT. 588).

Each Repondent was found guilty of all charges except Maxine Stones who was found guilty of all but one of the charges. Each Respondent was punished by the union (Appendix J).

On October 23, 1974, the Petitioner union sent letters to both the International Vice President and the International Secretary of the International Brotherhood of Electrical Workers Union which included:

> Copies of charges filed against employees of Precision Plastics Company for going through a recognized picket line (CR. 910 & 911, Resp. Exhs. 22 & 23, RT. 447,449*).

Following the union's determination of guilt and assessment of fines, each Respondent was threatened, in writing, that the union would take the matter to Court in order to

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*CR. references herein refer to the Clerks Record of the proceedings at trial and are part of the record on file with the Court of Appeal.

enforce payment. One such lawsuit was filed by the Petitioners against Respondent Claude Stones.

ARGUMENT

I

EVERY CIRCUIT TO CONSIDER THE QUESTION HAS HELD THAT THE AWARD OF PUNITIVE DAMAGES IS APPROPRIATE RELIEF WHERE EGREGIOUS UNION CONDUCT HAS BEEN DEMONSTRATED

Mr. Justice Blackmun, in the concurring Opinion in *IBEW v. Foust*, ... U.S. ....., 99 S.Ct. 2121, 60 L.Ed.2d 698 (1979) while discussing punitive damages awards in suits brought by workers against unions under the Landrum-Griffin Act points out, "Every circuit to consider the question has held that punitive damages are 'appropriate relief' when a union's conduct manifests 'actual malice or reckless or wanton indifference' to members' speech and associational rights. *Boilermakers v. Braswell,* 388 F.2d 193, 199-201 (CA5), *cert. denied,* 391 U.S. 935 (1968); *Cooke v. Orange Belt Dist. Council,* 529 F.2d 851, 820 (CA 9 1976); *Morrissey v. National Maritime Union,* 544 F.2d 19, 24-25 (CA2 1976); *Keene v. IUOE Local 624,* 569 F.2d 1375, 1381-1382, and n. 8 (CA5 1978). These courts noted that punitive damages would serve a legitimate deterrent purpose in appropriate cases. *Braswell,* 388 F.2d at 200; *Cooke,* 529 F.2d at 820."[5]

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[5]The stance adopted by the Sixth Circuit in *McCraw v. United Ass'n of Journeyman* 341 F.2d 705 (1968) has been cited for the proposition that punitive damages are not appropriate in the LMRDA context. (See *Murphy v. Operating Engineers, Local 18,* ..... F.Supp. ....., 99 LRRM 2041 (N.D. Ohio 1978).) Such reliance is misplaced. The question of punitive damages was not before

Petitioners argue that this Court's decision in *Foust* (supra) has limited the potential for recovery of punitive damages in the labor context.[6] The *Foust* decision is inapposite to the instant case.

The case herein clearly and solely arose from the violations by the Petitioners of the rights and protections afforded the Respondents by the LMRDA. The case is not one involving an unfair labor practice of the type that prompted the *Foust* litigation as Petitioners have urged. In *Foust,* this Court considered the issue of whether the Railway Labor Act permitted recovery of punitive damages from a union for breach of its duty of fair representation by its failure to process a member's wrongful discharge grievance. This Court specifically limited its holding to such suits and in so doing expressed "no view on the propriety of punitive awards in suits under the Landrum-Griffin Act [and concerned itself] . . . with judicially created remedies for a judicially implied cause of action." (Footnote 9, *IBEW v. Foust,* (supra).

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the *McCraw* court. The plaintiff in *McCraw* sought actual damages for personal injuries and economic loss and it was from their denial that he appealed.

> "With respect to his claim for damages, McCraw complains of the ruling of the District Judge that since the lawsuit was founded upon a violation of Section 411(a), Title 29 United States Code, and was brought pursuant to Sections 411(a) and 412, it was not a common law action for damages and damages would be limited to these which directly and proximately resulted from the alleged violation of the Act. *McCraw* (supra at 710)

In concurring with the District Court, the Sixth Circuit can hardly be said to have decided the availability of punitive damages pursuant to 29 U.S.C. § 412.

[6]Petition, pg. 12.

The Court points out that even though there is a clear statutory duty of fair representation,[7] the right to bring unfair representation suits is judicially implied. Congress did not specify what kinds of remedies are available in fair representation suits. That being so, the Court felt compelled to "implement a remedial scheme that will best effectuate the purposes of the Railway Labor Act, recognizing that the overarching legislative goal is to facilitate collective bargaining and to achieve industrial peace."

The Court decided that an award of punitive damages did not comport with that policy goal. In support of this decision the Court, citing its decision in *Vaca v. Sipes,* 386 U.S. 171 (1967), reasoned that although the purpose of fair representation suits is to compensate for injuries caused by violations of employees' rights, in the ordinary case the bulk of the damages are attributable to employer conduct. That being so, the burden of paying damages should be shifted to the party best able to bear the burden, the employer, not the union, with its limited treasury.

This fee shifting rationale might be apposite in a fair representation suit but it is patently inappropriate in the LMRDA context with its clearly mandated right to sue and its clear statement as to the propriety of damage awards.[8]

Mr. Justice Blackmun, joined by The Chief Justice, Mr. Justice Rehnquist, and Mr. Justice Stevens concurred in

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[7] *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944).

[8] § 102 of the Act (29 U.S.C. 412) permits suits "for such relief including injunctions as may be appropriate." this statutory language, in itself, allows for a broad scope of relief.

the result but wisely questioned the correctness and wisdom of the majority's promulgation of a *Per Se* rule, "that a union's breach of its duty of fair representation can never render it liable for punitive damages, no matter how egregious its breach may be."

Mr. Justice Blackmun and the concurring minority agree the "Court of Appeal's unanimous refusal to erect a *per se* bar to punitive damages against unions, both in unfair representation cases and in Landrum-Griffin cases, seems judicious. If a union's conduct should reveal intentional racial discrimination, deliberate personal animus, or conscious infringement of speech and associational freedoms, [We] can discern no principle of federal labor policy that stands in the way of a punitive award."

Petitioners argue that the legislative history of the LMRDA be considered. Respondents are in accord with this proposition but object to statements in the history being taken out of context and given unjustified interpretation. Petitioners quote Senator Morse's comments in opposition to the original draft of the Landrum-Griffin bill.[9] Senator Morse's comment was prophetically quite correct as, pursuant to the LMRDA as finally adopted, union members may undoubtedly sue union officers.[10] However, Petitioners' statement to the contrary notwithstanding, his comments made no reference, whatever, to recovery of punitive damages. It would be strange, therefore, for his colleagues to reply that punitive damages were not recoverable. Despite Petitioners' assertion that such a reply was

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[9]Petition, pg. 13, 14.

[10]29 U.S.C. §§ 412, 529.

made, no reference to where such reply may be found is given, and after searching the legislative history, Respondents have found none. Petitioners unsupported statement that the Sponsors of the LMRDA opposed the recovery of punitive damages under the Act is, in view of the gravity of proceedings in this forum, inappropriate.[11]

The LMRDA was meant by Congress to provide union members with basic rights and to insure that those rights could be protected. There is no prohibition expressed or implied in the legislative history against exemplary damages to insure enforcement of these rights. To the contrary, every indication is given that Congress wanted these rights enforced and violations prevented through the means available within the judicial process and in a forceful manner.

The Honorable Phil M. Landrum, a co-sponsor of the substitute bill which ultimately became the LMRDA declared that;

> "Again, in the words of the senior Senator from Arkansas, the distinguished John McClelland:
>
> > 'I say with all the force at my command, the substitute bill is not designed to penalize that which is good, but only to prevent that which is evil.'
>
> It is not designed to penalize that which is good. It is only to prevent that which is evil. That is what the substitute bill does. That is the only punitive part about it that I can find, if it is punitive, it is to stop that which is evil and help that which is good."
>
> Legislative History of the LMRDA of 1959, Vol. II, p. 1557, col. 1.

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[11]One of the cases cited by Petitioners allegedly regarding legislative intent of the sponsors, predates the LMRDA by approximately 9 years.

Representative Bailey of West Virginia, even in strenuously opposing the Landrum-Griffin substitute in favor of a weaker committee bill, expressed the sense of the Congress by declaring that;

> "what we seek to do here today is to punish only the guilty."

(Legislative History, supra, Vol. II, p. 1620)

The Honorable Robert P. Griffin, also a co-sponsor of the legislation which became the LMRDA, declared that;

> "The Landrum-Griffin substitute on the contrary provides the bill of rights teeth. . ."
>
> (Legislative History, supra, Vol. II, pp. 1544; 1566)

Representative Cramer of Florida expressed the feelings of his colleagues:

> "The Landrum-Griffin bill, which passed the House of Representatives by the overwhelming vote of 303 to 125 guarantees many basic rights to union members and backs up these rights with civil and criminal penalties."
>
> (Legislative History, supra, Vol. II, p. 1709)

Representative Thompson of Wyoming cautioned his colleagues:

> "we must be really careful that we do not give rights to union members in big print and take them away in fine print, as the saying goes."
>
> (Legislative History, supra, Vol. II, p. 1544)

Petitioners' emphasis on statements contained in the Legislative History of the LMRDA that the legislation is "not punitive" is misplaced in the context of the issue involved in this litigation. The issue here regarding "punitive" is what remedies are available for violations of

LMRDA rights, whereas the issue before Congress was what rights to provide and what controls to place on unions. Representative Bosch of New York, in support of the Landrum-Griffin bill, expressed the view that the use of the term "punitive" was a slogan.[12]

Representative Griffin was also aware of the problem with slogans and labels.[13]

The jury below found the requisite malice and reckless or wanton indifference required by each of the circuits and assessed appropriate punitive damages. The jury found, in response to special interrogatories submitted to them, that each Respondent was disciplined by the Petitioner IBEW for engaging in conduct protected by the Act and that as to each Respondent except Claude Stones, all three Petitioners acted "maliciously, oppressively, and in bad faith." (CR. pp. 996-1006).

The clear evidence below was that none of the Respondents were charged with any violations until each had

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[12]"The current slogan used by union leaders—and even some Members of this House—is that any effective labor reform bill is a punitive bill. What do they mean by punitive? Isn't this just another smokescreen by using an adjective, for all we know that a punitive bill is simply a bill that means what it says—it is simply a bill without the gimmicks and loopholes . . . But, Mr. Chairman, the Griffin-Landrum (sic) bill is only punitive with respect to those engaged in the abuses that it is designed to stop . . . What are some of the other so-called punitive provisions of the Griffin-Landrum (sic) bill? It would give union members the right . . . to sue a union." (Legislative History, supra, Vol. II, pp. 1615-1616.)

[13]"In general, the press coverage that has been accorded our substitute bill has been fair, accurate and objective. However, as might be expected, in some quarters the bill was quickly tagged as 'extreme', 'vicious' and 'antilabor'. Whether we like it or not, apparently a battle of tags and labels is on." (Legislative History, supra, Vol. II, p. 1534.)

resigned and returned to work. Promptly upon resignation, charges were filed against the Respondents alleging a violation of the union constitution for resigning and returning to work.[14] Resigning from a union and returning to work is permissible without fear of union retribution.[15] Resigning and returning to work is not a violation of any provision in the IBEW Constitution.

Petitioners, realizing that they could not punish Respondents directly for resigning and returning to work attempted to accomplish the same purpose by disciplining them through Cripes' charges. Their problem is that the alleged conduct supporting those charges is protected by the LMRDA Bill of Rights, and in some instances did not exist.[16]

Petitioners have maintained throughout the proceedings below that Respondents were not punished for resigning and returning to work. It would appear that, before this Court, Petitioners are adopting a different position in order to make an argument under the NLRA.[17]

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[14]Respondents Exhs. 13A-20A which were admitted into Evidence (CR. 869).

[15]*NLRB v. Allis-Chalmers Mfg. Co.* 388 U.S. 1975 (1967); *NLRB v. Granite State Jt. Bd. Textile Whrs. U. Local 1029*, 409 U.S. 213 (1972); *Booster Lodge No. 405, Int'l Assn. of Machinists v. NLRB*, 412 U.S. 84 (1973).

[16]Dan Carr was disciplined for attempting to persuade Frank Talavera to cross the picket line (CR. 137). Frank Talavera testified at trial that this was not true (RT. 762).

Claude Stones was charged with informing other Respondents "as to how they might find out how to resign from the union and encouraging them to do so." (CR. 146, ln. 30; 147, ln. 1). There is no evidence because it was not so. (RT. 197).

[17]Petition, p. 16.

The majority in *Foust,* (supra), realized that there is a delicate balance that must be maintained between individual and collective interests in the labor context. In the fair representation area this Court, quoting itself from *Vaca v. Sipes,* (supra), says, "the fair representation doctrines thus serves as a bulwark to prevent arbitary union conduct against individuals stripped of traditional forms of redress by the provisions of FEDERAL LABOR LAW." It seems appropriate to borrow this reasoning for use in an LMRDA context. This Court based its decision in *Foust,* partly on the rationale that in fair representation suits often the employer may appropriately bear the damage burden because the union's damaging conduct usually has consisted of a failure to process a grievance, not of initially perpetrating the damaging injury.

In the LMRDA context, where else may the aggrieved union member look but to the union. The LMRDA was created to redress union infringement on union members' due process, free speech and free assembly rights. As indicated previously herein, conduct such as was engaged in by the Petitioners impels the award of punitive damages. The intent and purpose of the LMRDA was to allow such damages. Without this Court's protection of the rights granted, the act would be rendered moot. If the award of punitive damages in appropriate cases were to be banned, it is the union members who would be punished by the inevitable loss of the rights granted by the LMRDA.

Petitioners also question whether compensatory and punitive damages are allowable to the union members under

the LMRDA where there is no evidence of consequential damage.[18] The Court of Appeals herein already disposed of this question by its citation in *its opinion,* of *Gill v. Manuel,* 488 F.2d 799, 802 (9th Cir. 1973), a deprivation of Civil rights suit under color of law, which states:

> "It should also be noted that an award of compensatory damages is not a necessary prerequisite to an award of punitive damages. See *Basista v. Weir,* 340 F.2d 74, 88 (3rd Cir. 1965)." 488 F.2d 799 (1973)

The Court of Appeals did, in fact, reverse the compensatory damages as to some of the Respondents but left their punitive damages intact, saying, "All plaintiffs established their *rights* to compensatory damages. Some of them failed to prove any such damages . . . Nevertheless, punitive damages are permissible to vindicate the invasion of those protected rights and as a deterrence against future violations by overzealous unions and their officers."[19] (emphasis in original) The Court of Appeals also found that as to Respondents Bise, Pappas, Maxine Stones and Kaona, there was evidence of consequential damage. (Appendix A-9).

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[18]Petition, pg. 3.

[19]Court of Appeals Opinion, Appendix A-10.

II

THE STANDARD OF REVIEW OF UNION TRIAL BOARD DECISIONS IS BROADENED WHERE DISCIPLINE HAS BEEN IMPOSED FOR IMPROPER PURPOSES

Petitioners would agree that they lacked power to discipline non-members and former members.[20] That is so; in *NLRB v. Granite State Jt. Bd. Textile Whrs. U. Local 1029,* 409 U.S. 213 (1972) this Court was faced with a factual situation very similar to the instant case. In that case the court held that it was an unfair labor practice within the terms of the National Labor Relations Act (29 U.S.C. § 157, 158(b)(1)) for the union to fine employees who had been union members in good standing but who had resigned during a lawful strike and thereafter returned to work during the strike. The Court, in so doing, said:

> "Yet when a member lawfully resigns from the union, its power over him ends . . . [cite omitted] if a union rule invades or frustrates an overriding policy of the labor laws the rule may not be enforced, even by fine or expulsion, . . . Under [§ 157] of the Act the employees have 'the right to refrain from any or all' concerted activities relating to collective bargaining or mutual aid and protection, as well as the right to join a union and participate in those concerted activities . . . We have, therefore, only to apply the law which normally is reflected in our free institutions—the right of the individual to join or to resign from associations, as he sees fit."

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[20]Petition, p. 16.

In *Booster Lodge No. 405, Int'l Assn. of Machinists v. NLRB,* 412 U.S. 84 (1973), the Court expanded its holding in *Granite State,* (supra) by a finding that union members are free to resign and return to work during a strike even though the union constitution expressly prohibits such conduct. The Court of Appeals relied on *Granite State,* (supra) and *Booster Lodge* (supra) in affirming the trial court judgment and identified the issue presented to the trial court as one of determining the Petitioners' intents and motives for disciplining the Respondents. The Court pointed out that there was substantial evidence in the record that it was the Respondents' post-resignation return to work that prompted the fines; that the charges filed against Respondents were for pre-resignation conduct clearly within the protection of the LMRDA; and that the jury could have reasonably arrived at the conclusion that it was the union's purpose to punish the Respondents for resigning and returning to work.[21]

The Petitioners argue that the Court of Appeals erred in its review of the Petitioners' trial board decisions; that the responsibility of the court was to determine that there was some evidence supporting Petitioners' trial board decisions. The Petitioners rely on *International Brotherhood of Boilermakers v. Hardeman,* 401 U.S. 233 (1971) to support their argument.[22] The Court of Appeals indicated that Petitioners' reliance on *Hardeman* was misplaced:

> "Unlike the question presented in *Hardeman,* the infirmity is not in the procedure used or the method of discipline, but in the fact that the discipline is being

[21]Court of Appeals Opinion, Appendix A-6 and 7.
[22]Petition, pg. 18, 19.

> imposed for an improper purpose. To adopt the Union's reading of *Hardeman* would have the effect of 'insulat[ing] any Union discipline of a member, so long as the charges brought against him are supported by 'some evidence', no matter how insubstantial or suspicious that evidence might be.' [cite omitted] We will not adopt such a reading."[23]

The Court followed the reasoning of the Second Circuit as presented in *NLRB v. Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehouseman and Helpers of America*, 479 F.2d 57 (2d Cir., 1972), that the clear import of the *Hardeman* (supra) decision is not that "some evidence" to support the charge will preclude Board or judicial review, but rather, that unless some evidence is presented by the charging party against the accused member, the union will be held to have violated the due process requirement implicit in Section 101(a)(5)(C) of the Act. [The court added that] "while we must respect the congressional judgment of judicial noninterference in the internal affairs of unions, we must also not forget the special need to protect individual members against the danger of overreaching by entrenched union leadership."[24]

The Respondents have consistently cited *Hardeman* (supra) in their arguments below centering around their due process claims in accord with the reasoning of the Court in *NLRB v. Local 294* (supra).

Other courts have held that the alleged limited scope of judicial review, as presented in *Hardeman* (supra), is

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[23]Court of Appeals Opinion, footnote 5.

[24]Court of Appeals Opinion, footnote 5.

altered when § 411(a)(2) free speech and assembly rights are involved.

In *Pearl v. Tarantola*, 361 F.Supp. 288 (S.D. N.Y. 1973), for example, the district court discussed the alleged limitations, as follows:

> In *Boilermakers v. Hardeman* [cite omitted], an action based on alleged wrongful expulsion from a union, the Supreme Court held that the district court was not empowered by § *411(a)(5)* of the LMRDA to interpret union regulations in order to determine the scope of offenses warranting discipline of union members. The general posture of a court reviewing a union's determination is thus limited to a determination whether there was sufficient evidence to support the findings of the union. However, when exercise of free speech and assembly are involved, the scope of review is somewhat different. As the 3rd Circuit in *Semancik v. United Mine Workers of America Dist. #5*, 466 F.2d 144 (3rd Cir. 1972) recently held:
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> > 'While it is beyond the province of the court to scrutinize whether unions may punish members for particular behavior, (citations omitted), the same prohibitions do not apply to actions involving free speech, the cornerstone of all union democracy.' 466 F.2d at 153.
>
> Thus, this Court must scrutinize the alleged First Amendment behavior sought to be punished by the Union, to see if such punishment comports with the First Amendment and its statutory embodiment, § 411(a)(2) of the L.M.R.D.A."

The Petitioners, as they have done repeatedly throughout this action, state incidents of alleged conduct of Respondents that is allegedly unprotected. The incidents are

couched in the most sinister terms. In reality when the statements of alleged conduct are scrutinized it becomes obvious that even the most sinister of the allegations are descriptive of protected conduct. The jury below so found; the Court of Appeals, in affirming, held that the jury's finding of a violation of Respondents' rights of freedom of speech and assembly was sufficiently grounded in the evidence. Furthermore, in so doing, they did not, in any way, alter the standard of review set forth in *Hardeman* (supra).

III

THE ASSESSMENT OF THE APPROPRIATENESS OF EXHAUSTION OF INTERNAL UNION APPEAL PROCESSES IS WITHIN THE SOUND DISCRETION OF A DISTRICT COURT

The Court of Appeals has made it clear that it is within the sound discretion of the courts to decide whether exhaustion of internal union remedies will be required in any given case.[25] The Petitioners are in accord.[26]

That the language of the statute regarding exhaustion is not mandatory, also speaks very clearly as to the intent of Congress.[27]

The District Court below found that exhaustion was not required, in its ruling on cross-summary judgment motions.[28] The court reiterated this finding in its opinion,[29]

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[25]Court of Appeals Opinion, Appendix A-4 and 5.
[26]Petition, pg. 20.
[27]29 U.S.C. 411(a)(4) (Appendix I).
[28]Reporter's Transcript, January 9, 1976, Appendix E-2 and 3.
[29]District Court Opinion, Appendix H-2 and 4.

basing its decision on the 9th Circuit's holding in *Ross v. IBEW*, 544 F.2d 1022 (9th Cir. 1976). In *Ross v.* IBEW (supra), the main issue considered by the court was IBEW's constitutional prohibition of filing suit against the union without first making use of the internal appeal processes for four months. The court said:

> "It has been established that it is a court, not the union itself, which may require the exhaustion of 'reasonable hearing procedures' for up to four months as mentioned in the statute."

The Court of Appeals reasoned that while the exhaustion principle is calculated to foster union self-regulation, that where, as here, improperly disciplined members raise issues in the public domain, such as violation of First Amendment rights, the courts should not delay consideration pending exhaustion, and further, that where such rights are involved, it is within the sound discretion of a trial court to determine whether a union's internal procedures may be adequate.[30]

The Petitioners assertion that the Court of Appeals "failed to provide criteria against which a reasonable review of the Trial Court's discretion could occur",[31] ignores this sound reasoning of the Court of Appeals, and it must be emphasized that the Court hastened to add that "the mere assertion by a union member that his free speech rights have been infringed will not, in all cases, render

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[30]Court of Appeals Opinion, Appendix A-5 and 6.

[31]Petition, pg. 20.

the exhaustion doctrine inapplicable. It is within the sound discretion of the trial court to make this determination."[32] The Court simply found, on review, that the trial court herein had acted well within its discretion in not requiring exhaustion.[33]

Petitioner's assertion that the Respondents herein should have been required to exhaust their intra union appeals because there was no imminent threat of interference with their rights is unsupported by the evidence.[34] Each Respondent had been sent a letter from the union serving notice that the union would take the matter to court if the fines were not paid within ten (10) days. One such letter was sent each to Claude Stones[35] and Stella Bradley.[36] The other Respondents were each sent two such letters, dated November 21, 1974 and December 26, 1974. Each letter indicated, "This is your final notice" and in the last letter sent the word "Final" was underlined.[37] On December 27, 1974, the union filed suit against Claude Stones to collect the fine.[38] Stones was served with that lawsuit.[39] Respondents assert that the interference was imminent and as a result of the threatening letters and the actual filing of suit against Respondent Claude Stones, Respondents were

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[32]Court of Appeals Opinion, Footnote 3, Appendix A-3.

[33]Court of Appeals Opinion, Appendix A-6.

[34]Petition, pg. 20.

[35]RT. 195, Petitioners Exh. 1013-G.

[36]RT. 140, Petitioners Exh. 1006-G.

[37]RT. 131,344,263,369,146, Petitioners Exh. 1005-F&G, 1007 through 1012 F&G.

[38]CR. 292, Respondents Exh. 21-D.

[39]CR. 195, ln. 10-11.

compelled to file suit immediately in the court below seeking an injunction.

Since the early *Detroy v. American Guild of Variety Artists*, 286 F.2d 75 (1961) *cert. denied* 366 U.S. 929 (1961), the various circuits have remained consistent in their holding that the requirement of exhaustion is a question for the trial judge, to be answered by the facts of each individual case.

CONCLUSION

Respondents respectfully submit that the Petition for Writ of Certiorari be denied. The opinion of the Court of Appeals below is well-reasoned and is not indicative or provocative of disagreement among the Circuits and this Court.

Respectfully submitted,

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